IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

KAREN COOPER, Petitioner, v. IOWA PUBLIC EMPLOYMENT RELATIONS BOARD and STATE OF IOWA, DEPARTMENT OF HUMAN RIGHTS, DIVISION ON STATUS OF AFRICAN-AMERICANS, Respondents.	}	Case No. AA 3157 RULING ON DEFENDANT'S MOTION TO DISMISS

The above-captioned matter came on for hearing on December 23, 1998. Petitioner Karen Cooper ("Cooper") was represented by her attorney, Rod Powell. Respondents Iowa Public Employment Relations Board ("PERB") and the State of Iowa ("State") were represented by Jan Berry. After reviewing the record and hearing the arguments of counsel, the court finds as follows.

FINDINGS OF FACT

1. Karen Cooper was employed by the State of Iowa in the Department of Human Rights, Division on Status of African-Americans. Her employment was terminated on June 27, 1996.

2. Cooper filed a State Employee Grievance and Disciplinary Action Appeal with PERB on October 8, 1996, appealing from an unfavorable third step grievance decision from the Iowa Department of Personnel; the Department of Personnel resisted Cooper's appeal.

3. PERB entered an Order on March 5, 1998, dismissing Cooper's grievance in its entirety.

Cooper then filed a Petition for Review on March 25, 1998 with PERB, that was also resisted by the Iowa Department of Personnel. PERB entered a Decision on Review that affirmed their earlier Order dismissing Cooper's appeal on July 24, 1998.

4. Cooper filed a petition for judicial review on August 21, 1998 in the district court, seeking review of the final agency action of PERB. Cooper also filed a Notice of Service of Process on Respondents, indicating that she had served a copy of the filed petition to the Attorney General, Thomas Miller, at the Hoover Building in Des Moines.

5. A scheduling order of the district court was entered on November 24, 1998, but PERB was only made aware of the order on December 2, 1998, when they were contacted by the Attorney General's Office. PERB was never sent a copy of the petition for judicial review filed by Cooper.

6. Cooper alleges that she is entitled to judicial review of her petition. PERB contends that the district court never acquired jurisdiction to hear the dispute because PERB was never properly served with a copy of the petition.

CONCLUSIONS OF LAW AND FURTHER FINDINGS OF FACT

A motion to dismiss will be granted only if the "pleadings make certain that the pleader has failed to state a claim upon which relief can be granted under any state of facts provable under the allegations." Brumage v. Woodsmall, 444 N.W.2d 68, 69 (Iowa 1989). "A motion to dismiss admits the allegations of the petition and waives any ambiguity or uncertainty in the petition." Leuchtenmacher v. Farm Bureau Mutual Life Insurance, 460 N.W.2d 858, 861 (Iowa 1994).(citations omitted). "The petition should be construed in a light most favorable to the plaintiff with doubts resolved in that party's favor in ruling on the motion. The motion to dismiss is sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief

under any state of facts that could be proved in support of the claims asserted." Haupt v. Miller, 905 N.W.2d 911 (Iowa 1994) (citing Bindel v. Iowa Manufacturing Co., 197 N.W.2d 552, 555 (Iowa 1972).

Proceedings for judicial review of an agency action are commenced by filing a petition in the district court. The Public Employment Relations Board is an administrative agency subject to the Administrative Procedure Act. Maquoketa Valley Community School Dist. v. Maquoketa Valley Ed. Ass'n, 279 N.W.2d 510 (1979). The provisions of Iowa Code section 17A.19 are the exclusive means for seeking judicial review of administrative action in the absence of a statute that provides for a more specific mean of service. Green v. Iowa Dep't of Job Serv., 299 N.W.2d 651, 654 (Iowa 1980). The procedures in 17A.19(2) are jurisdictional; a failure to comply with them deprives the district court of appellate jurisdiction over the case. Dawson v. Iowa Merit Employment Comm'n, 303 N.W.2d 158, 160 (Iowa 1981).

The issue in this case is whether or not Cooper's service of her petition for judicial review to the Attorney General was sufficient to meet the jurisdictional notice requirements of Iowa Code Section 17A.19(2). The statute provides that :

> 17A.19. Judicial review
>
> 2. Proceedings for judicial review shall be instituted by filing a petition either in Polk county district court or in the district court for the county in which the petitioner resides or has its principal place of business. *** Within ten days after the filing of a petition for judicial review the petitioner shall serve by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition *to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional.* The delivery by personal service or mailing referred to in this subsection may be made upon the party's attorney of record in the proceeding before the agency. *** (Emphasis added.)

Cooper mailed a copy of her petition to the Attorney General of Iowa rather than to PERB, the agency that handled the review of the dismissal of her grievance against the Department of Human Rights. PERB contends that Cooper failed to comply with the jurisdictional notice requirements of 17A.19(2) and that as a result, the district court lacks jurisdiction to hear her petition and must dismiss the case. Cooper contends that she accomplished service when she mailed the Original Notice and Petition to the Iowa Attorney General's Office via certified mail.

Cooper contends that at all times, she was in substantial compliance with the requirements of 17A.19(2) and that substantial compliance with the statute is enough to survive a motion to dismiss. The statutory service under 17A.19(2) is jurisdictional, but Iowa courts have repeatedly held that substantial, not literal, compliance with section 17A.19(2) is all that is necessary to invoke the jurisdiction of the district court. Brown v. John Deere Waterloo Tractor Works, 423 N.W.2d 193 (Iowa 1988), Richards v. Iowa Dep't of Revenue, 362 N.W.2d 486, 488-89 (Iowa 1985), Frost v. S. S. Kresge Company, 299 N.W.2d 646 (Iowa 1980) and Cowell v. All-American, 308 N.W.2d 92 (Iowa 1981). Lack of substantial compliance with the 17A.19(2) requirements precludes the district court from acquiring jurisdiction over the case. Cowell v. All-American, Inc., 308 N.W.2d 92, 94 (Iowa 1981).

The Iowa Supreme Court found that there had been substantial compliance with the notice provisions of 17A.19(2) in Brown v. John Deere Waterloo Tractor Works, 423 N.W.2d 193 (Iowa 1988). In Brown, service to the parties in an action *prior* to filing a petition with the clerk of court was not fatal to the jurisdiction of the district court, because the petitioner had

provided additional notice to the parties not required by the statute. The court in Brown wrote that:

> " "[s]ubstantial compliance" with a statute means actual compliance in respect to the substance essential to every reasonable objective of the statute. It means that a court should determine whether the statute has been followed sufficiently so as to carry out the intent for which it was adopted. Substantial compliance with a statute is not shown unless it is made to appear that the purpose of the statute is shown to have been served. What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case. Smith v. State, 364 So.2d 1, 9 (Ala.Crim.App.1978) (citation omitted); accord Dorignac v. Louisiana State Racing Comm'n, 436 So.2d 667, 669 (La.App.1983). We essentially adopted this definition in Superior/Ideal, Inc. v. Board of Review, 419 N.W.2d 405, 407 (Iowa 1988)."

Substantial compliance with 17A.19(2) was also found in Monson v. Iowa Civil Rights Commission, 467 N.W.2d 230 (1991), where a sheriff's attempt to serve the Civil Rights Commission in the wrong location could not be fairly attributed to the petitioning employee. In Frost v. S. S. Kresge Company, 299 N.W.2d 646 (Iowa 1980), an agency was misnamed in a petition for judicial review as the 'Industrial Commission' instead of the 'Industrial Commissioner'; because the commissioner actually received notice of the proceeding and no prejudice occurred, the court found that there was sufficient compliance with section 17A.19(2).

In order to determine whether Cooper was in substantial compliance with the statute, the Court must examine the actions taken and the ultimate result. Under 17A.19(2), Cooper was required to mail copies of her petition to "all parties named in the petition" within ten days after its filing. The term "party" is defined in section 17A.2(5): " 'Party' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." Cooper failed to send a copy of the petition to either PERB or the Department of Human Rights; both agencies were named parties in the petition for judicial review. In Record v. Iowa

Merit Employment Dep't, 285 N.W.2d 169, 172-73 (Iowa 1979), the Iowa Supreme Court held that the failure to mail a copy of the petition to the former employer who had participated in the proceedings before the agency deprived district court of jurisdiction because statute required mailing to "all parties of record" under 17A.19(2). While PERB was the reviewing agency and not a party of record in the administrative proceeding, PERB was a "party named in the petition" under 17A.19(2) and was entitled to notice of the appeal.

Cooper next contends that service on the Attorney General is all that is required under 17A.19(2) because the Attorney General is required to defend all appeals in which the State of Iowa is a party or interested. Iowa Code 13.2 (1997). Cooper submits that the State of Iowa is a real party in interest, citing Record v. Iowa Merit Employment Dept., 285 N.W.2d 169 (Iowa 1979) for that proposition. However, in Record, the "real party in interest" was the petitioner's former employer, the Job Service Division, not the State of Iowa, and the notice was required to be served on the agency and not the Attorney General. This Court can find no statute that provides for service of notice on a state agency through the Attorney General, and in the absence of specific statutory authority to accomplish notice in this manner, it fails to meet the substantial compliance standard. Cooper also failed to serve a copy of her petition to her former employer, the Department of Human Rights, a real party in interest, as well as PERB. Petitioner's argument overlooks the language in section 17A.19(2), which requires a mailing to "all parties named in the petition." Record provides no precedent to prove that Cooper's actions were in substantial compliance with the statute.

Cooper's failure to serve the two respondent agencies with the petition does not rise to the level of substantial compliance. In order to find that there was substantial compliance, the

purpose of the statute must have been effectuated by the petitioner's actions. Parties served with copies of a petition for judicial review by the district court have ordinarily been parties throughout the agency proceedings and are familiar with the issues in the contested case. *See* Richards v. Iowa Dept. of Revenue, 362 N.W.2d 486 (Iowa 1985). PERB was only notified of the appeal when the existence of a scheduling order was communicated to them over 100 days after the petition had been filed. If neither agency that participated in the contested case proceeding receives notice that the petitioner has appealed, the intent of the statute has been defeated.

The other case cited by the petitioner, Buchholtz v. Iowa Dept. of Public Instruction, 315 N.W.2d 789, (Iowa 1982), does not prove that Cooper acted in substantial compliance with 17A.19(2). In Buchholtz, service on only one of three closely related agencies substantially complied with section 17A.19(4) requirement to name as a respondent the agency whose action is challenged. In the case at bar, there is no "virtual merger of identity" as in Buchholtz between the Attorney General, PERB and the Department of Human Rights. These three entities do not perform related duties; nor were their names used interchangeably on documents and filings during the administrative process. Unlike the agencies in Buchholtz, PERB never received timely mailed notice of the petition. The intention of 17A.19(2) is to strike a fair balance between simplifying judicial review and the need for efficient, economical and effective governmental administration. Frost v. S.S. Kresge Co., 299 N.W.2d 646, 647-48 (Iowa 1980). Cooper's actions provide neither efficient review nor efficient administration and fail to comport with the intent and objectives of the statute.

Finally, in the alternative, Cooper alleges that even if there was a delay in appropriate

service to PERB, such a delay is not fatal to her petition for review because the delay was not intentional and abusive. In Alvarez v. Meadow Lane Mall Ltd. Partnership, 560 N.W.2d 588 (Iowa 1997), the Iowa Supreme Court held that excessive delays in service can create a presumption of abuse. Once a presumption is created, the burden of the defendant to show prejudice shifts to the plaintiff, who is required to establish a justification for the delay. If plaintiff fails in this burden, the action must be dismissed. In the case at bar, there was not only a delay in service, but the service was never accomplished; this oversight is sufficient to meet the intent of the presumption.

If the delay was presumptively abusive the court must then determine if the plaintiff has carried the burden of proving the delay was justified. Cooper provides no argument explaining why PERB was never contacted. If it was not justified, the case must be dismissed. Cooper's actions do not comport with the intent and spirit of the 17A.19(2) notice requirement and therefore, even in light most favorable to her, no state of facts exist which can support her compliance with the rule and therefore, the case should be dismissed.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the Respondent's motion to dismiss is granted.

Dated this 11th day of January, 1999.

JACK D. LEVIN, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

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